King's Fire Protection, Inc. and its alter ego Warrior Sprinkler, LLC *and* Road Sprinkler Fitters, Local Union No. 669, U.A., AFL–CIO. Cases 05–CA–036094 and 05–CA–036312

June 23, 2015

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

On September 27, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 358 NLRB No. 156. Thereafter, the General Counsel filed an application for enforcement in the United States Court of Appeals for the Third Circuit.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the Board filed a motion with the court of appeals to vacate and remand the case, and for expedited issuance of mandate, in light of *Noel Canning*. The court of appeals granted the Board's motion on September 8, 2014. The court also issued a mandate returning the case to the Board.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning,* supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision, and we agree with the rationale set forth therein. Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision and Order reported at 358 NLRB No. 156, which is incorporated herein by reference.

In its prior decision, the Board found that the Respondents, employers in the construction industry, and the Charging Party Union had a bargaining relationship governed by Section 9(a) of the Act, rather than Section 8(f), and that the Respondents unlawfully terminated that relationship and failed to abide by all the terms of an extant collective-bargaining agreement. The Board's determination of the nature of the parties' relationship was based solely on language contained in their January 18, 2005 assent and interim agreement. As indicated, we have examined the Board's findings, and agree with them.

Our dissenting colleague disagrees, however. In his view, the record indicates that the Union "*never* presented King's with evidence of majority support" in the relevant bargaining unit to justify its claim, as expressed in the parties' 2005 agreement, to have majority representative status under Section 9(a) of the Act. He contends that this requires a finding that the Union had a nonmajority bargaining relationship falling under Section 8(f), and that the relationship was therefore terminable by the Respondents upon the contract's expiration. See *John Deklewa & Sons*, 282 NLRB 1375, 1377–1378 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988). We find our colleague's view unpersuasive.[2]

[1] On September 22, 2014, the Charging Party filed an amended motion for consolidation and reconsideration. In its motion, the Charging Party sought to consolidate this case with *USA Fire Protection*, vacated decisions at 358 NLRB No. 162 (2012), and 359 NLRB No. 59 (2013), and *Austin Fire Equipment, LLC*, vacated decisions at 359 NLRB No. 3 (2012), and 359 NLRB No. 60 (2013). On September 30, 2014, Austin filed a brief in opposition to the amended motion. On October 6, 2014, the Charging Party filed a reply to Austin's opposition. We find that the requested actions are not warranted, and we deny the Charging Party's motion to consolidate. See *Austin Fire Equipment*, 361 NLRB No. 76, slip op. at 1 fn. 2 (2014), and *USA Fire Protection*, 361 NLRB No. 58, slip op. at 1 fn. 1 (2014).

[2] Our dissenting colleague also states his disagreement with *Central Illinois Construction* (*Staunton Fuel)*, 335 NLRB 717 (2001), in which the Board held that clear and unequivocal contract language can establish an 9(a) relationship in the construction industry. In our colleague's view, *Staunton Fuel* is in conflict with *Ladies Garment Workers Union v. NLRB (Bernhard-Altmann)*, 366 U.S. 731 (1961), and was rejected in *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003). The basis for *Staunton Fuel*'s holding was explained in that decision, and we find it unnecessary to repeat that explanation here. We note, however, that although *Ladies Garment Workers* established that an employer violates Sec. 8(a)(2) if it recognizes a union that in fact lacks majority support as a 9(a) representative, the issue in *Staunton Fuel* was how the Board should *determine* whether a construction employer has agreed to recognize a union under Sec. 8(f) *or* under Sec. 9(a). An employer's failure to review a union's proffered showing of majority support when the parties executed their contract does not indicate that the union in fact lacked such support. In *Nova Plumbing,* as we have previously recognized, the D.C. Circuit held that the Board could not find that a construction bargaining relationship was established under Sec. 9(a) solely on the basis of contract language where there was extrinsic, uncontradicted evidence that the union did *not* have majority support. The court did not hold, as suggested by our dissenting colleague, that contract language can never be held to establish a 9(a) relationship. Rather, the D.C. Circuit has, subsequent to *Nova Plumbing*, effectively rejected our colleague's reading of that case. In *Allied Mechanical Services v. NLRB*, 668 F.3d 758, 768–769 (D.C. Cir. 2012), the court rejected as dicta and as an "overreading of *Nova Plumbing*" a statement in *M&M Backhoe Service*, 469 F.3d 1047, 1050 (D.C. Cir. 2006) that "[w]e held in *Nova Plumbing* that an offer of proof could not substitute for actual proof." The court clarified that "[t]he precise holding of *Nova Plumbing* is that an employer and union

Our colleague focuses on a brief question and answer on the record between the Respondent King's Fire's counsel and its president, Harry Smith. That exchange is set out in the prior decision, see 358 NLRB No. 156, slip op. at 1 fn. 1, but, in substance, Smith testified that at no time since 2001 had the Union "presented" any documents to him establishing the Union's majority status. Based on this testimony, our colleague concludes that the General Counsel failed to rebut the presumption that collective-bargaining relationships in the construction industry are governed by Section 8(f). But, as noted in the earlier decision, it is not clear that this brief testimony even referred to the events surrounding the parties' 2005 agreement. See id. We note further that the Respondents did not cite this statement to the judge or in their brief to the Board.

Moreover, even assuming that the Union did not actually "present" Smith with evidence of its majority support in 2005, this would not be inconsistent with a finding of 9(a) status under *Staunton*. Neither that assumption, nor any other evidence in the record, negates King's Fire's affirmation in the parties' 2005 agreement that it "freely and unequivocally acknowledges that *it has verified* the Union's status as the exclusive bargaining representative of its employees pursuant to Section 9(a) of the Act . . . and that the Union *has offered* to provide the Employer with confirmation of its support by a majority of such employees" (emphasis added).[3] King's Fire might have confirmed that majority support through an independent, noncoercive inquiry of its own. At most, Smith's testimony suggests that King's Fire did not avail itself of the Union's offer. His testimony does not establish that the Union lacked majority status. Contrary to our colleague's argument, in making this observation we are not shifting the burden to the Respondent to establish an 8(f) relationship. Rather, we are simply pointing out that Smith's testimony is not fatal to the General Counsel's case based on the parties' 2005 Agreement, which clearly establishes a 9(a) relationship.[4]

The judge's recommended Order, as further modified here, is set forth in full below.[5]

ORDER

The National Labor Relations Board orders that the Respondents, King's Fire Protection, Inc., and Warrior Sprinkler, LLC, Mechanicsburg, Pennsylvania, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize the Union as the exclusive collective-bargaining representative of all employees in the bargaining unit described below.

(b) Refusing to bargain with the Union regarding the terms of a collective-bargaining agreement to succeed its contract with the Union which expired on March 31, 2010.

(c) Making changes to employees' wages, benefits, and other terms and conditions of employment without first notifying and bargaining in good faith with the Union to either agreement or impasse.

(d) Refusing to participate in the grievance and arbitration procedure under the parties' collective-bargaining agreement which expired on March 31, 2010.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All Journeymen Sprinkler Fitters and Apprentices

(b) On request of the Union, rescind any changes to employees' terms and conditions of employment made on or after April 1, 2010, and retroactively restore terms and conditions of employment, including wage rates and benefit plans, to what they were prior to April 1, 2010.

(c) Make whole all bargaining unit employees to the extent they have suffered any losses in pay and benefits as a result of the Respondents' unlawful conduct, including losses to the Union's health and welfare, pension and

in the construction industry are not free to 'convert' an 8(f) relationship into a 9(a) bargaining relationship 'that lacks support of a majority of employees.'" 668 F.3d at 769. See also, *Raymond Interior Systems,* 357 NLRB No. 193, slip op. 1 fn. 3 (2011); *M&M Backhoe Service,* 345 NLRB 462 (2005), enfd. 469 F.3d 1047 (D.C. Cir. 2006). We note that in *Ladies Garment Workers Union,* supra, there was no dispute that the union lacked majority support at the time of recognition. Here, however, as discussed below, there is no evidence that the Union lacked majority status when the parties signed the assent and interim agreement in 2005.

[3] For this reason, it is irrelevant that King's Fire had no employees on the date the parties signed their first agreement in 2001, a fact emphasized by our colleague.

[4] Our dissenting colleague also asserts that contrary to *Casale Industries,* 311 NLRB 951 (1993), the 6-month limitations period in the Act's Sec. 10(b) cannot bar any challenge to a construction employer's contractual recognition of a bargaining representative under Sec. 9(a). Because we do not rely on Sec. 10(b) in finding that the Respondents unlawfully withdrew recognition, we need not address the applicability of *Casale*.

[5] We shall modify the Order in accordance with our recent decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We shall also substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

other benefit funds, occurring on or after April 1, 2010, with interest, in the manner set forth in the remedy section of the judge's decision. Amounts due shall be computed based on the terms of employment established in the collective-bargaining agreement effective between April 1, 2007 and March 31, 2010.

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(e) Participate in the grievance and arbitration procedure under the collective-bargaining agreement which expired March 31, 2010, by agreeing to select an arbitrator as requested by the Union on March 25 and August 24, 2010.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at their facility in Mechanicsburg, Pennsylvania, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 5 after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other means, if the Respondents customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents has gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since April 1, 2010.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. June 23, 2015

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

The National Labor Relations Act (NLRA or Act) permits two very different types of bargaining relationships. Most bargaining relationships, governed by Section 9(a), require a showing that the union has *majority support* among unit employees, and when the collective-bargaining agreement expires, the union enjoys a continuing presumption of majority status, and the employer has a continuing obligation to recognize and bargain with the union.[1] A second type of bargaining relationship, governed by Section 8(f), permits *pre-hire* union recognition by construction-industry employers even though the union has no majority support. Indeed, as it name indicates, a "pre-hire" agreement can be entered into when the employer does not yet have *any* employees.[2] However, "upon the expiration of such [pre-hire] agreements, the signatory union will enjoy no presumption of majority status, *and either party may repudiate the 8(f) bargaining relationship*." *John Deklewa & Sons*, 282 NLRB 1375, 1377–1378 (1987) (emphasis added), enfd.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] Sec. 9(a) states in part: "Representatives designated or selected for the purposes of collective bargaining by the *majority* of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . ." (Emphasis added.)

[2] Sec. 8(f) states in part: "It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement . . . with a labor organization of which building and construction employees are members . . . because (1) the *majority status of such labor organization has not been established* under the provisions of section 9 of this Act prior to the making of such agreement . . . : Provided . . . , That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)" (emphasis added).

sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

There is an important reason for this key difference between 9(a) "majority support" relationships on the one hand and 8(f) "pre-hire" relationships on the other. As the Board recognized in *Deklewa*, although Section 8(f) permits "pre-hire" agreements without a showing that the union has employee support (based on considerations unique to the construction industry[3]), Congress "was mindful of employee free choice principles" and "sought to assure that the rights and privileges accorded employers and unions in the body of Section 8(f) would not operate to thwart or undermine construction industry employees' representational desires."[4] Therefore, after a "pre-hire" agreement's operative term, "the signatory union acquires no other rights and privileges of a 9(a) exclusive representative. Unlike a full 9(a) representative, the 8(f) union enjoys no presumption of majority status on the contract's expiration and *cannot . . . require bargaining for a successor agreement*."[5]

In *Deklewa*, supra, the Board adopted a rebuttable presumption that a bargaining relationship in the construction industry was established under Section 8(f), and it placed the burden of proving that the relationship instead falls under Section 9(a) on the party making that assertion (here, the General Counsel). See *Madison Industries*, 349 NLRB 1306, 1308 (2007). In doing so, however, the Board did not foreclose a construction-industry union from achieving 9(a) status. Id. A construction-industry union can achieve 9(a) status "either through a Section 9 certification proceeding or 'from voluntary recognition accorded . . . by the employer of a stable work force where that recognition is based on a clear showing of majority support among the unit employees, e.g., a valid card majority.'" Id. (quoting *Deklewa*, 282 NLRB at 1387 fn. 53) (ellipsis in *Madison Industries*).

In my view, the facts of this case, viewed in light of the above principles, require a finding that the Respondents had an 8(f) "pre-hire" relationship with the Union, and this means the Respondents acted lawfully when, upon the labor contract's expiration, they exercised their right to "repudiate the 8(f) bargaining relationship." *Deklewa*, 282 NLRB at 1378. Therefore, I respectfully dissent from my colleagues' finding that the Respondents violated Section 8(a)(5) of the Act when they refused to bargain with the Union following expiration of their collective-bargaining agreement.[6]

My colleagues concede that, upon contract expiration, Respondents could have violated Section 8(a)(5) only if the Union had a "majority support" relationship governed by Section 9(a). They find that the General Counsel successfully proved the existence of a 9(a) relationship based solely on language in the parties' 2005 assent and interim agreement stating that Respondent King's Fire Protection, Inc. (King's) "had verified the Union's status as the exclusive bargaining representative of its employees pursuant to Section 9(a) of the Act and the Union offered to provide [King's] with confirmation of its support by a majority of such employees."[7] However, there is good reason not to accept that language at face value. As explained below, a previous contract between the parties *falsely* recited that King's had confirmed the Union's majority status, and the record contains uncontroverted evidence that the Union *never* presented King's with evidence of majority support.

The parties' bargaining relationship began on March 23, 2001, the day that King's was incorporated. On that day, the parties signed a recognition agreement containing the following language:

> The Employer executing this document below has, on the basis of objective and reliable information, confirmed that a clear majority of the sprinkler fitters in its employ have designated, are members of, and are represented by, [the Union]. The Employer therefore unconditionally acknowledges and confirms that [the Union] is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act.

However, on that day, *King's had not yet hired any employees*! Thus, as the judge properly found, "on March 23, 2001, it was impossible for employees of Respondent King's to establish that a clear majority designated the Un-

[3] As the Board recognized in *Deklewa*, when Congress enacted Sec. 8(f) in 1959 "[i]t had become established practice in the construction industry for employers to recognize and enter into collective-bargaining agreements with a construction industry union . . . even before any employees had been hired." 282 NLRB at 1380. This practice, Congress found, had come about for two reasons:

> One reason . . . [was] that it [was] necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason [was] that the employer must be able to have available a supply of skilled craftsmen ready for quick referral. A substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union.

Id. (quoting S. Rep. 86–187 (1959), reprinted in 1 NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 424) (footnote and other citation omitted).

[4] 282 NLRB at 1380–1381.

[5] Id. at 1387 (emphasis added).

[6] I concur in the majority's finding that the Respondents violated Sec. 8(a)(5) and (1) to the extent they failed to apply terms of the parties' 2007–2010 collective-bargaining agreement prior to its expiration.

[7] There is no record evidence that the Union ever had majority support among the unit employees.

ion as their bargaining representative." In short, the recitation in the 2001 recognition agreement that King's had confirmed the Union's majority support was demonstrably false.

Against that background, on January 18, 2005, King's entered into an assent and interim agreement with the Union, which the majority relies on to find a 9(a) relationship. The 2005 agreement recites that King's "had verified the Union's status as the exclusive bargaining representative of its employees pursuant to Section 9(a) of the Act and the Union offered to provide [King's] with confirmation of its support by a majority of such employees." However, the uncontroverted testimony of King's president, Harry Smith, establishes that *at no time* since March 23, 2001, had any agent of the Union ever presented King's with evidence that the Union enjoyed majority status among King's unit employees. My colleagues assert that Smith's testimony "did not . . . controvert [the 2005] agreement's recitation that 'the Union *offered to provide* the Employer with confirmation of its support by a majority of such employees'" (emphasis added). But the 2005 agreement also recites that King's "had *verified* the Union's status as the exclusive bargaining representative of its employees pursuant to Section 9(a) of the Act" (emphasis added), and Smith's testimony *did* controvert that recitation. To verify the Union's majority status, King's would have had to have seen evidence of majority support—and Smith unequivocally testified that the Union never presented evidence of majority support. Thus, Smith's testimony contradicts the assertions in the 2005 agreement.[8]

In sum, contract language is the only evidence that the Union ever had majority support, and that language is contradicted by record evidence. In *Central Illinois*, the Board held that contract language, standing alone, can be sufficient to confer 9(a) status.[9] However, I believe the Board's position in *Central Illinois* is precluded by the Supreme Court's decision in *Garment Workers*, supra, 366 U.S. at 731, and the Board's holding in *Central Illinois* was squarely rejected by the Court of Appeals for the District of Columbia Circuit in *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003). In my view, *Ladies Garment Workers* and *Nova Plumbing* are persuasive and controlling in this case.

In *Ladies Garment Workers*, an employer signed an agreement that purported to recognize a union as the "exclusive bargaining representative" of "all production and shipping employees" when, in fact, less than one-half of the unit employees had authorized the union to represent them. 366 U.S. at 734 fn. 4. The Supreme Court upheld the Board's finding that this grant of 9(a) recognition to a union that lacked majority support violated Section 8(a)(2) of the Act.[10] The Court emphasized:

> In their selection of a bargaining representative, § 9(a) . . . guarantees employees freedom of choice and majority rule. . . . Bernhard-Altmann granted exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority. *There could be no clearer abridgment of § 7 of the Act*, assuring employees the right 'to bargain collectively through representatives of their own choosing' or 'to refrain from' such activity.[11]

Significantly, the Court rejected arguments that the employer's and union's "good-faith beliefs" in the union's majority status should constitute a "complete defense": "To countenance such an excuse would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives."[12] Regarding 9(a) recognition, the Court concluded that "[t]he

[8] My colleagues say that "[t]he Respondent might have confirmed [] majority support through an independent, noncoercive inquiry of its own," and thus Smith's testimony does not establish to a certainty that King's never verified the Union's majority status. In advancing this argument, the majority loses sight of the applicable legal standard. It is not King's burden to prove an 8(f) bargaining relationship. The Board *presumes* as much, and it is the General Counsel's burden to rebut that presumption. To carry his burden, the General Counsel relies solely on the recitation in the 2005 agreement. But Smith's testimony that the Union never presented evidence of majority status is persuasive evidence that the recitation was untrue, and there is no evidence that Respondent undertook the inquiry about which the majority speculates.

[9] See *Central Illinois Construction* (*Staunton Fuel)*, 335 NLRB 717 (2001). Even in *Central Illinois*, where the Board held that certain "clear and unequivocal" contract language is sufficient to establish a 9(a) relationship, the Board also held that a 9(a) relationship was not established by the mere mention of "Section 9(a)" in the collective-bargaining agreement. The Board stated that an explicit reference to Sec. 9(a) "would indicate that the parties *intended* to establish a majority rather than an 8(f) relationship." 335 NLRB at 720 (emphasis added). However, the Board added that "[t]he issue . . . is not simply whether the parties may have intended to change their relationship *but whether they succeeded in doing so*." Id. at 720 fn. 17 (emphasis added).

[10] Sec. 8(a)(2) of the Act makes it unlawful for an employer, among other things, to "contribute financial or other support" to a labor organization. Sec. 8(a)(2) has long been held to render unlawful a grant of 9(a) recognition to a union that lacks majority support "because the union so favored is given 'a marked advantage over any other in securing the adherence of employees.'" *Ladies Garment Workers*, 366 U.S. at 738 (quoting *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267 (1938)). It is also unlawful under Sec. 8(a)(2) for an employer to grant c. 9(a) recognition before it employs a substantial and representative complement of employees engaged in normal business operations. See, e.g., *Elmhurst Care Center*, 345 NLRB 1176, 1177 (2005); *Cascade General*, 303 NLRB 656 (1991).

[11] 366 U.S. at 737 (emphasis added).

[12] Id. at 738–739.

act made unlawful . . . is employer support of a minority union. Here that support is an accomplished fact. *More need not be shown, for, even if mistakenly, the employees' rights have been invaded*."[13]

In *Nova Plumbing*, supra, the D.C. Circuit relied on *Garment Workers* and squarely rejected the Board's holding in *Central Illinois* that contract language, standing alone, can confer 9(a) status without independent evidence that the union has majority support. The court of appeals reasoned as follows:

> The proposition that contract language standing alone can establish the existence of a section 9(a) relationship *runs roughshod over the principles established in Garment Workers,* for it completely fails to account for employee rights under sections 7 and 8(f). An agreement between an employer and union is void and unenforceable, *Garment Workers* holds, if it purports to recognize a union that actually lacks majority support as the employees' exclusive representative. While section 8(f) creates a limited exception to this rule for pre-hire agreements in the construction industry, the statute explicitly preserves employee rights to petition for decertification or for a change in bargaining representative under such contracts. . . . The Board's ruling that contract language alone can establish the existence of a section 9(a) relationship—and thus trigger the three-year "contract bar" against election petitions by employees and other parties—creates an opportunity for construction companies and unions to circumvent both section 8(f) protections and *Garment Workers*' holding by colluding at the expense of employees and rival unions. *By focusing exclusively on employer and union intent, the Board has neglected its fundamental obligation to protect employee section 7 rights, opening the door to even more egregious violations than the good faith mistake at issue in Garment Workers*.
>
> Section 8(f) represents a real benefit to both employers and unions in the construction industry, allowing them to establish bargaining relationships without regard to a union's majority status. *But the Board cannot, as it did here and in Central Illinois, allow this relatively easy-to-establish option to be converted into a section 9(a) agreement that lacks support of a majority of employees*. Otherwise the Board would be giving employers and unions "the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives."[14]

I agree with the D.C. Circuit that the Board cannot properly conclude that a 9(a) relationship exists unless the General Counsel satisfies the burden of introducing sufficient evidence—separate from collective-bargaining agreement language—that rebuts the presumption that construction-industry collective-bargaining agreements are governed by Section 8(f). As the D.C. Circuit stated in *Nova Plumbing,* 330 F.3d at 537: "Standing alone . . . contract language and intent cannot be dispositive at least where, as here, the record contains strong indications that the parties had only a section 8(f) relationship."[15]

[13] Id. at 739 (emphasis added).

[14] 330 F.3d at 536–537 (emphasis added) (quoting *Ladies Garment Workers,* 366 U.S. at 738–739). Under the contract-bar doctrine the court referred to, collective-bargaining agreements of definite duration "for terms up to 3 years will bar an election for their entire period," and "contracts having longer fixed terms will be treated for bar purposes as 3-year agreements and will preclude an election for only their initial 3 years." *General Cable Corp.*, 139 NLRB 1123, 1125 (1962) (fn. omitted); see also *NLRB v. Burns Security Services*, 406 U.S. 272, 290 fn. 12 (1972). Sec. 9(a) recognition also gives rise to a "recognition bar." Under the recognition-bar doctrine, an employer's voluntary recognition of a union as its unit employees' 9(a) representative bars any decertification or rival-union petition for a "reasonable" period of time, which the Board has defined to be "no less than 6 months after the parties' first bargaining session and no more than 1 year." *Lamons Gasket Co.*, 357 NLRB No. 72, slip op. at 10 (2011). Interpreting this definition in *Americold Logistics, LLC*, 362 NLRB No. 58 (2015), the Board held that the recognition-bar period may last up to a full year after the date of the first bargaining session—potentially *more than* a year from the date of voluntary recognition. Thus, *Lamons Gasket* (as construed in *Americold Logistics*) "create[s] an upside-down regime under which, if employees *elect* a union, they cannot have another election for a year, but if the union becomes their representative *without* an election, they may be barred from casting ballots in a Board election for *more than* a year." *Americold Logistics*, supra, slip op. at 8 (Member Miscimarra, dissenting). If the parties enter into a collective-bargaining agreement during the recognition-bar period, a contract bar takes effect. Thus, more than 4 years may pass following a contractual grant of 9(a) recognition deemed valid under *Central Illinois* before employees have an opportunity to choose whether to be represented by a union.

[15] Contrary to the majority's assertion, the D.C. Circuit in *Allied Mechanical Services v. NLRB*, 668 F.3d 758, 768–769 (D.C. Cir. 2012), did not effectively reject my reading of *Nova Plumbing*. In *Allied Mechanical*, the record contained evidence other than contract language supporting the Board's finding that the parties there had a 9(a) bargaining relationship. Specifically, the union had offered to furnish proof of its majority status, the General Counsel issued a complaint premised on the existence of a 9(a) bargaining relationship, and Allied signed a settlement agreement (approved by the Regional Director) resolving those complaint allegations, in which it agreed to recognize and bargain with the union as the exclusive collective-bargaining representative of its unit employees. Although the settlement agreement contained a nonadmission clause, the court observed that this only established that Allied "was not admitting to having violated the Act. Allied specifically agreed to recognize and bargain with the Union without any section 8(f) caveats." 668 F.3d at 768. The court found that "on the record here, the Board's decision clearly rests on a showing of union support

As a final matter, I believe that the judge improperly found, relying on *Casale Industries*, 311 NLRB 951 (1993), that challenges to an agreement's purported conferral of 9(a) recognition are time-barred unless an unfair labor practice charge or representation petition is filed by employees, the employer, or a rival union within the 6-month limitations period set forth in Section 10(b) of the Act.[16] For several reasons, I believe it is improper to apply the 10(b) 6-month limitations period in this context.[17]

First, the 10(b) limitations period only applies to unfair labor practices, and it is *not* an unfair labor practice for a construction-industry employer to confer "pre-hire" recognition pursuant to Section 8(f). Here, the Board is evaluating *whether* the collective-bargaining agreement conferred "pre-hire" recognition under Section 8(f) rather than "majority support" recognition under Section 9(a). When the same 6-month limitations argument was asserted in *Nova Plumbing*, the court of appeals stated: "this argument begs the question" because the "fundamental issue at the heart of this case is whether the . . . contract was subject to section 8(f) or 9(a)," and "only if the parties formed a section 9(a) relationship" was there an "unfair labor practice" that would "thereby trigger the six-month time limit."[18]

Second, the Board in *Casale Industries* held that construction-industry agreements purporting to establish a "majority support" relationship under Section 9(a) should be immune from challenge after 6 months based on a concern that otherwise, "stability in labor relations would be undermined."[19] However, when the Board in *Deklewa* established the principles governing 8(f) relationships, it gave careful consideration to the balance struck by Congress—when it decided to permit 8(f) prehire agreements in the construction industry—between "stability in labor relations" and the importance of "majority support" in the selection of 9(a) representatives. The Board in *Deklewa* stated: "The principles we advance today represent a more appropriate interpretation and application of Section 8(f), and they will better serve the statutory policies of protecting labor relations stability *and* employee free choice in the construction industry."[20] The importance of protecting employee free choice was emphasized in *Ladies Garment Workers*, where the Supreme Court explained that the Act "guarantees employees freedom of choice and majority rule" and rejected claims that "good-faith beliefs" by the company and union should be deemed a "complete defense" to a 9(a) recognition of a minority union. The Court further stated that requiring 9(a) recognition to be based on *actual* employee majority support was not an "onerous burden" nor would it "induce a breakdown" or "seriously impede the progress of collective bargaining."[21] I believe *Casale Industries* improperly discounts the importance of protecting employee free choice, which was deemed paramount when Congress differentiated between 8(f) and 9(a) recognition and when the Board and the Supreme Court decided *Deklewa* and *Garment Workers*, respectively.

Third, when the Board in *Casale Industries* immunized construction-industry employers and unions from any challenge to a purported 9(a) relationship after 6 months, it reasoned that the same protection from delayed claims had been conferred on employers and unions *outside* the construction industry, and "[p]arties in the construction industry are entitled to no less protection."[22] In so reasoning, however, the Board in *Casale Industries* disre-

among a majority of employees in an appropriate unit, as required by *Nova Plumbing*." Id.

Moreover, even under my colleagues' narrower reading of *Nova Plumbing*—i.e., that contract language alone *may* establish a union's 9(a) status provided the record is devoid of evidence to the contrary—the General Counsel has failed to establish the Union's 9(a) status here because "the record contains strong indications that the parties had only a section 8(f) relationship." *Nova Plumbing*, 330 F.3d at 557. As stated above, King's had *no* employees on March 23, 2001, when it entered into an agreement falsely reciting that King's had "confirmed that a clear majority of the sprinkler fitters in its employ have designated, are members of, and are represented by, [the Union]"; and uncontroverted testimony establishes that after March 23, 2001, the Union *never* presented King's with evidence of majority support (contrary to language in the parties' 2005 agreement).

[16] Prior to *Casale Industries*, the Board applied a similar rule to employers *outside* the construction industry, finding that Sec. 10(b) barred untimely allegations that an employer had unlawfully extended 9(a) recognition to a minority union. *North Bros. Ford,* 220 NLRB 1021, 1021–1022 (1975) (citing *Machinists Local 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411 (1960)). In *Casale*, the Board extended this non–construction-industry rule to construction-industry employers. In my view, as explained in the text, the two contexts are materially different, and I believe the Board cannot properly rely on Sec. 10(b)'s 6-month limitations period to avoid determining whether the General Counsel has satisfied his burden of overcoming the presumption that a construction-industry collective-bargaining agreement extends recognition under Sec. 8(f).

[17] Unlike the judge, my colleagues do not rely on the General Counsel's alternative argument that Respondents' challenge to the Union's majority status is time-barred. They need not reach that argument, having found majority status based on contract language alone. I am compelled to reach the alternative argument because, if meritorious, it would furnish grounds for affirming the judge's finding that Respondents violated Sec. 8(a)(5) by withdrawing recognition from the Union when the parties' collective-bargaining agreement expired *even if* they had a "pre-hire" bargaining relationship under Sec. 8(f). For the reasons stated in the text, however, the General Counsel's argument is meritless.

[18] 330 F.3d at 539.

[19] 311 NLRB at 953.

[20] *Deklewa*, 282 NLRB at 1378 (emphasis added).

[21] *Ladies Garment Workers*, 366 U.S. at 737–741.

[22] 311 NLRB at 953.

garded a crucial distinction. Outside the construction industry, the *only* type of lawful exclusive bargaining relationship is a 9(a) relationship premised on a showing of majority support. Therefore, when a *non*construction-industry employer applies *any* collective-bargaining agreement to its employees, if a majority of those employees do not support the union, the affected employees and/or one or more rival unions are likely to file an unfair labor practice charge or a representation petition with the Board. Yet, in the construction industry, as noted above, "pre-hire" labor contracts, which do not require *any* employee support, are lawful under Section 8(f). Moreover, under *Deklewa*, construction-industry employers and unions are *presumed* to have entered into "pre-hire" relationships.[23] Therefore, in the construction industry, if a written agreement purports to create a 9(a) relationship, the employer's conferral of "majority support" recognition will be imperceptible to employees because "pre-hire" collective-bargaining agreements are the industry norm. Nor would potential rival unions, who likewise understand that "pre-hire" agreements are typical in the industry and permissible under Section 8(f), have any reason to know whether or when a particular employer has entered into an agreement purporting to confer 9(a) recognition. This makes it highly unlikely that any party in the construction industry will challenge a recognition during the first 6 months of an agreement that, based on its language alone, ostensibly created a n 9(a) relationship. In most cases, employees and nonsignatory unions will regard such a contract as a conventional "pre-hire" agreement for its duration—often spanning multiple years—without realizing that the agreement contained language purporting to convert the "pre-hire" recognition, under *Central Illinois*, into a 9(a) relationship.[24] In this regard, the Board's dual holdings in *Central Illinois* and *Casale*, respectively, are particularly onerous: *Central Illinois* locks employees into a 9(a) relationship with a union lacking majority support, and *Casale* throws away the key 6 months later.

It is important to recognize that the issue here involves only what *the Board* will consider when determining *what type* of relationship has been entered into by the parties. The basic rules regarding 8(f) and 9(a) relationships have already been established by Congress in the Act and by the Board and the courts in *Deklewa* and other cases, and neither my colleagues nor I suggest any change in these rules. It also bears emphasis that neither the Union nor Respondents are alleged to have acted in bad faith when entering into their "pre-hire" agreement.[25] And if the parties wished to ensure a valid 9(a) recognition, the Act does not impose an onerous burden: the only requirement is a contemporaneous showing of majority support.[26] In any event, the existence of employee majority support is the cornerstone of 9(a) recognition, and the Board should safeguard that requirement even if doing resulted in a substantially higher burden on the parties. As the Supreme Court stated in *Ladies Garment Workers*: "Individual and collective employee rights may not be trampled upon merely because it is inconvenient to avoid doing so."[27]

For these reasons, I would find the Respondents did not violate Section 8(a)(5), upon the expiration of their collective-bargaining agreement, by treating the relationship as one that had been established under Section 8(f). Accordingly, as to this issue, I respectfully dissent.

Dated, Washington, D.C. June 23, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[23] *Deklewa*, 282 NLRB at 1387 fn. 41.

[24] Ironically, the Board repudiated this type of "conversion doctrine" in *Deklewa* because parties could never reliably determine whether or when 8(f) recognition converted into a 9(a) relationship. Under the pre-*Deklewa* "conversion doctrine," a. 8(f) bargaining relationship converted to 9(a) recognition if and when the union showed it "enjoyed majority support, during a relevant period, among an appropriate unit of the signatory employer's employees." 282 NLRB at 1378. *Central Illinois* effectively reinstates a type of relationship "conversion" that, as illustrated by the instant case, is even more troubling than the conversion doctrine that the Board abandoned in *Deklewa*. The pre-*Deklewa* conversion doctrine at least required a showing by the General Counsel that a union actually enjoyed majority support at a relevant time. Under *Central Illinois*, mere words are sufficient to cause "pre-hire" recognition to convert to Sec. 9(a) status, even where, as here, there has been no showing of actual employee majority support.

[25] Again, however, the Supreme Court in *Ladies Garment Workers* stated that the presence or absence of valid 9(a) recognition does not depend on "a showing of good faith." 366 U.S. at 739 (fn. omitted).

[26] *Nova Plumbing*, 330 F.3d at 536 (citation omitted). As noted previously, the Board would also require that the employer have a substantial and representative complement of employees who are engaged in normal operations at the time 9(a) recognition is extended. See fn. 13, supra.

[27] 366 U.S. at 740.

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize Road Sprinkler Fitters, Local Union No. 669, U.A. AFL–CIO (the Union) as the exclusive collective-bargaining representative of our employees in the unit described below.

WE WILL NOT refuse to bargain with the Union regarding terms of a collective-bargaining agreement to succeed our contract with the Union, which expired on March 31, 2010.

WE WILL NOT make any changes to employees' wages, benefits, and other terms and conditions of employment without first notifying and bargaining in good faith with the Union to either agreement or impasse.

WE WILL NOT refuse to participate in the grievance and arbitration procedure under the parties 2007–2010 collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All Journeymen Sprinkler Fitters and Apprentices

WE WILL, on request of the Union, rescind any changes to employees' terms and conditions of employment made on or after April 1, 2010, and retroactively restore terms and conditions of employment, including wage rates and benefit plans, to what they were prior to April 1, 2010.

WE WILL make whole bargaining unit employees to the extent they have suffered any losses in pay and benefits as a result of our unlawful conduct, including losses to the Union's health and welfare, pension and other benefit funds, occurring on or after April 1, 2010, with interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

KING'S FIRE PROTECTION, INC. AND ITS ALTER EGO WARRIOR SPRINKLER, LLC

The Board's decision can be found at www.nlrb.gov/case/05-CA-036094 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.